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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 72

THE TEXAS & PACIFIC RAILWAY COMPANY,
Petitioner,

—against—

JESSIE A. KILPATRICK,
Respondent.

No. 73

THE TEXAS & PACIFIC RAILWAY COMPANY,
Petitioner,

—against—

L. M. PARKER,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

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July 15, 1948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 839

THE TEXAS & PACIFIC RAILWAY COMPANY,

Petitioner,

—against—

JESSIE A. KILPATRICK,

Respondent.

No. 840

THE TEXAS & PACIFIC RAILWAY COMPANY,

Petitioner,

—against—

L. M. PARKER,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

We desire briefly to reply to the contention which has been feebly advanced in the respondents' brief that the questions presented by the petition for certiorari are moot.

The respondents contend that since the original actions commenced by them in the Southern District of New York have been voluntarily dismissed by the plaintiffs themselves (R. 43), and since the Circuit Court of Appeals has

held that the said actions were properly dismissed by the plaintiffs (R. 181), there remains nothing further for this Court to decide and therefore the questions presented are moot. This argument is utterly without merit.

Subsequent to the commencement of the original actions, the plaintiffs commenced identical new actions (R. 48, 61). These new actions were stayed by order of the District Court pending determination of the jurisdictional issue raised in the original actions (R. 65, 135-136, 149-151). The Circuit Court of Appeals expressly held that the pendency of the second actions, in which precisely the same jurisdictional issue is involved as in the original actions, saved the appeals from the orders in the original actions from being dismissed as moot (R. 181-182). Thus, to save the expense, time and effort of further appeals to the Circuit Court of Appeals in the second actions in order to present for determination by that court precisely the same jurisdictional question as was then before that court in the original actions, the Circuit Court of Appeals refused to regard the appeals as moot and accordingly decided the jurisdictional question as presented by the record before it. We ask this Court, by means of the instant petition for certiorari, to review the same jurisdictional question and upon the same record as was before the Circuit Court of Appeals.

The following language from the opinion of the Circuit Court of Appeals shows clearly the reasoning which led it to reject the contention, now sought to be raised by the respondent herein, that the appeals were moot (R. 181-182):

> "It does not appear to us necessary to pick a footing through such a morass. It is clear that the first action should be regarded as ended by the plaintiff's notice of dismissal, and it makes no difference whether that is when we reverse the order which vacated it, or when

it was filed. All that can possibly be at stake is whether in reversing the order of dismissal, we shall be acting upon a matter that has become moot. That would be true had the plaintiff not brought the second action, which has all along remained procedurally untouched, except for the stay which is now at an end. If we should now refuse to decide the appeal from the order dismissing the action, precisely the same question would remain open as to the second action that the judge decided in the action at bar; and presumably, when the defendant moves to dismiss that action for lack of jurisdiction over the person, the judge who hears that motion will follow the first. On the ensuing appeal we should be in precisely the same position that we now are as to the order dismissing the first action; nothing would be gained, and considerable time and effort would be lost. We cannot believe that we are not free to cut our way out of such a tangle of verbiage, even though it may be literally true that the appeal from the order of dismissal becomes moot, as soon as the order of vacation is out of the way, either because we reverse it, or say that it is a nullity.

We decide the appeals as the record presents the facts. It was said at the bar that the plaintiffs had discontinued the second actions in reliance upon the defendant's assurance that it would not press the point that the summons had been served on the wrong officer. The effect of this, if true, and all questions which may be raised by facts not before us on this record, are to be understood to be open for decision in the district court. As the appeals stand in this court both orders in each of the actions will be reversed."

Pursuant to the last paragraph of the opinion of the Circuit Court of Appeals quoted above, the plaintiffs have taken steps in the District Court to revive the second actions which now are pending on the calendar in the District Court. In these second actions there stands undetermined, awaiting decision by this Court on the instant petition for certiorari, precisely the same jurisdictional question raised in the original actions and which the Circuit Court of Appeals anticipated would be raised in the second actions when it refused to regard that question as moot upon the record before it (R. 182).

Dated: New York, N. Y., July 15, 1948.

Respectfully submitted,

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